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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. TERRENCE LEE DRAPER, Defendant and Appellant.	B261994 (Los Angeles County Super. Ct. No. GA088496)

APPEAL from an order of the Superior Court of Los Angeles County, Terry Lee Smerling, Judge. Affirmed.

Ken K. Behzadi, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Mary Sanchez and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

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Terrence Lee Draper appeals the trial court's denial of a petition pursuant to Proposition 47 to reduce his felony conviction of receiving stolen property (Pen. Code, § 496, subd. (a)) to a misdemeanor. He contends the trial court erred in considering the prosecution's evidence outside of the record of his conviction to determine the value of the vehicle he stole exceeded $950, rendering him ineligible for Proposition 47 resentencing. Respondent contends we need not reach this question because appellant failed to carry his initial burden to show eligibility for resentencing. If we disagree, respondent contends the trial court properly denied the petition by considering evidence outside of the record of conviction that the vehicle was worth more than $950. We agree with the latter contention, so we will assume appellant carried his initial burden of proof. We affirm.

BACKGROUND

After being charged with multiple offenses, appellant pled guilty to one count of receiving stolen property—a vehicle—in violation of Penal Code section 496, subdivision (a) and admitted prior "strike" allegations.[1] He was sentenced to three years eight months in state prison.

On December 4, 2014, he filed a one-page form motion to reduce his conviction to a misdemeanor pursuant to Proposition 47. He checked a box that "the value of the property at issue does not exceed $950," but he did not submit his own declaration or any other evidence to show the value of the car involved in his offense. Later, through counsel, he filed a lengthy petition for reduction of his sentence pursuant to section 1170.18, subdivisions (a) and (f), provisions added by Proposition 47. He argued the prosecution bore the burden to show he was ineligible for resentencing, and that showing was limited to the record of conviction. Because the record of conviction did not contain admissible evidence showing the property involved in his offense exceeded $950, his conviction had to be reduced to a misdemeanor. He attached two vehicle reports completed by California Highway Patrol (CHP) officers—in one, an officer valued the

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[1] All undesignated statutory citations are to the Penal Code.

car at $2,500; and in the other, a different officer checked a box valuing the car between $301 and $4,000. He also attached a printout from the Department of Motor Vehicles showing the owner of the car purchased it for $300 several months before appellant committed the offense in this case.

In a combined hearing on appellant's petition and on restitution, the owner of the car testified it was worth $2,700 and she had incurred $280 for costs associated with the tow yard and for lost wages. The trial court awarded the $280 as restitution, and, because appellant did not object to the owner's testimony on the car's value, the court found that testimony sufficient to deny his petition to reduce his sentence.

DISCUSSION

Appellant sought resentencing pursuant to section 1170.18, added by Proposition 47, which provides, "A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." (§ 1170.18, subd. (a).) "A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be 'resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.18, subd. (b).) Subdivision (c) of section 1170.18 defines the term 'unreasonable risk of danger to public safety,' and subdivision (b) of the statute lists factors the court must consider in determining 'whether a new sentence would result in an unreasonable risk of danger to public safety.' (§ 1170.18, subds. (b), (c).)" (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1092.)

Appellant was convicted and sentenced for receiving stolen property in violation of section 496, subdivision (a). That provision was amended by Proposition 47 and now makes receiving stolen property a misdemeanor if the property involved is worth less

than $950: "Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. However, if the value of the property does not exceed nine hundred fifty dollars ($950), the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year, if such person has no prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290. [¶] A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property."

Generally, courts have placed the initial burden on the petitioner to show eligibility for resentencing under Proposition 47. (See, e.g., *People v. Perkins* (2016) 244 Cal.App.4th 129, 136, and cases cited therein (*Perkins*).) That burden entails "set[ting] out a case for eligibility, stating and in some cases showing the offense of conviction has been reclassified as a misdemeanor and, where the offense of conviction is a theft crime reclassified based on the value of stolen property, showing the value of the property did not exceed $950. [Citations.] The defendant must attach information or evidence necessary to enable the court to determine eligibility." (*Id.* at pp. 136-137.) That information could include at least the petitioner's "testimony about the nature of the items taken. If he made the initial showing the court can take such action as appropriate to grant the petition or permit further factual determination." (*People v. Sherow* (2015) 239 Cal.App.4th 875, 880 (*Sherow*).)

For purposes of our decision here, we will assume appellant met his initial burden to show eligibility for relief. We agree with respondent that the trial court properly

denied the petition based on the owner's testimony that the vehicle was worth more than $950, rendering appellant ineligible for resentencing.

At least one court has held the trial court is not limited to the record of conviction in determining eligibility or ineligibility under Proposition 47. (See *Perkins, supra*, 244 Cal.App.4th at p. 140, fn. 5 ["[O]ffenders may submit extra-record evidence probative of the value when they file their petitions for resentencing."].) *Sherow* also suggested as much when it noted a petitioner could submit his or her own testimony with the petition to establish the value of the property involved in the offense was less than $950. (*Sherow, supra*, 239 Cal.App.4th at p. 880.)

We agree with these decisions. Section 1170.18 does not limit the parties or the trial court to the record of conviction in determining a defendant's eligibility for resentencing. To the contrary, it seems to contemplate the use of extra-record evidence by providing relief to defendants "who would have been guilty of a misdemeanor" had Proposition 47 been in effect at the time of their offense. Moreover, before Proposition 47, receiving stolen property was chargeable as a felony or misdemeanor in the discretion of the district attorney or grand jury if the value of the property involved did not exceed $950. (See Couzens & Bigelow, Proposition 47 "The Safe Neighborhoods and Schools Act" (Feb. 2016) p. 31.) Here, the district attorney opted to charge appellant with a felony, so value was not an issue. (*Perkins, supra*, 244 Cal.App.4th at p. 136 ["At the time of defendant's conviction, the prosecution was permitted to plead and prove receipt of stolen property as a felony regardless the value of the stolen property."].) This would be true for most theft and similar offenses reduced by Proposition 47, so in most cases the record of conviction will not contain any evidence of value of the property involved. Given that courts have placed the burden on petitioner to show eligibility for reduction under Proposition 47, most petitioners would be excluded from relief if they were limited to the record of conviction in establishing eligibility. Although in this case the prosecution offered extra-record evidence to demonstrate appellant's *in*eligibility, appellant has given us no reason why the same rule should not apply equally to both parties.

Appellant relies on cases that have limited review to the record of conviction in considering various forms of relief for criminal defendants. None of these cases arose under Proposition 47, and we find them distinguishable because none involved an enactment that added *elements* to an offense beyond what the prosecution had to plead and prove at the time of conviction. For example, in *People v. Guerrero* (1988) 44 Cal.3d 343, our Supreme Court held trial courts may look to the "entire record of the conviction" in determining whether a prior conviction was a serious felony for the purpose of a sentencing enhancement pursuant to section 667. (*Guerrero*, at p. 355.) Similarly, in *People v. Bradford* (2014) 227 Cal.App.4th 1322 (*Bradford*), a Proposition 36 case, the court analogized to *Guerrero* and held trial courts were limited to the record of conviction in determining whether a petitioner was ineligible for relief under the Three Strikes Reform Act. (*Bradford*, at 1338-1340.)

Perkins distinguished *Bradford* because Proposition 47 is fundamentally different than the Three Strikes Reform Act. As *Perkins* succinctly explained: "[E]ligibility for resentencing under [the Three Strikes Reform Act] turns on the nature of the petitioner's convictions—whether an offender is serving a sentence on a conviction for nonserious, nonviolent offenses and whether he or she has prior disqualifying convictions for certain other defined offenses. (§ 1170.126, subd. (e).) By contrast, under Proposition 47, eligibility often turns on the simple factual question of the value of the stolen property. In most such cases, the value of the property was not important at the time of conviction, so the record may not contain sufficient evidence to determine its value. For that reason, and because petitioner bears the burden on the issue [citation], we do not believe the *Bradford* court's reasons for limiting evidence to the record of conviction are applicable in Proposition 47 cases." (*Perkins, supra*, 244 Cal.App.4th at p. 140, fn. 5.)

At the hearing on appellant's Proposition 47 petition, the owner of the car testified without objection that the vehicle involved in appellant's offense was worth $2,700. The trial court credited this testimony, and it constituted sufficient evidence to demonstrate appellant was not eligible for resentencing under section 1170.18. Thus, the trial court properly denied appellant's petition.

DISPOSITION

The order is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.